

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

BMS # 14-PA-0212

JEFFREY W. JACOBS

ARBITRATOR

February 19, 2014

IN RE ARBITRATION BETWEEN:

Met Council Transit Operations,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 13-PA-0212
Jaqueline Bednarczyk Grievance

ATU, #1005.

APPEARANCES:

FOR THE EMPLOYER:

Andrew Parker, Attorney for the Employer
Jim Perron, Ass't Transportation Manager
Mike McNamara, Manager of Rail Operations
Edwin Pedersen, dispatcher
Christy Bailly, Dir. of Bus Operations

FOR THE UNION:

Bill O'Brien, Attorney for the Union
Jaqueline Bednarczyk, grievant
Dan Abramowitz, Union Representative
Mark Leach, grievant's former spouse

PRELIMINARY STATEMENT

Hearings in the above matter were held on February 5, 2014 at the Met Council Transit Operations Center 725 7th St. North, Minneapolis, MN. The parties presented oral and documentary evidence at that time. The parties waived post-hearing briefs.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement Article 13 of which provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural arbitrability issues and the matter was properly before the arbitrator.

ISSUES PRESENTED

Was the discipline of the grievant just and merited as required by Article 5 of the collective bargaining agreement? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The employer took the position that the discipline of the grievant was just and merited. In support of this position, the employer made the following contentions:

1. The grievant is a rail operator who is familiar with all of the rules regarding her responsibility to be honest in all her dealings with the employer and the need to be trustworthy at all times. She operates a rail vehicle with hundreds of passengers aboard and for the most part is unsupervised on a daily basis.

2. Further, the grievant is familiar with the Code of Conduct for all the employer's employees as well as with the requirements for filing for FMLA. She knew and was advised that falsification of any of these documents or being untruthful with the employer is a dischargeable offense. The employer pointed to the provisions of its policy that call for certain types of offenses that have historically and consistently been treated as warranting dismissal even for a first offence. The employer also cited numerous prior arbitral awards for the proposition that fraud or dishonesty or falsification of official forms, such as FMLA requests, have always been treated as dischargeable, irrespective of the length of service or the record of the person involved. The employer needs and expects its employees to be honest and forthright in all dealings with the public and with the employer and simply does not and cannot tolerate anything short of that. See, Joint Exhibits 2, 3 and 4.

3. Turning to the specifics of this case, the employer asserted that the grievant falsified her FMLA requests and continued to lie about the circumstances surrounding that request even after being shown clear evidence of her application for those benefits throughout the investigative and grievance process of this matter

4. The employer pointed out that the grievant was injured in a work related incident and was out of work for a period of time following that injury. The injury occurred in October 2012 but was not reported until November 29, 2012. She was out of work on workers compensation from late November until late December when she returned to work on light duty. She typically had weekends off and stayed on that schedule until May 2013. The employer noted that early in the week of May 6th the grievant asked to change her regular days off, i.e. Saturday and Sunday, May 11-12, 2013, to May 15 and 16, 2013. This was approved and the grievant was then scheduled to work on the weekend of the 11th and 12th of May.

5. The basis of the employer's case was that on May 11th the grievant called dispatch and spoke to Mr. Pedersen and told him that she needed to take the day off to help her son move and to retrieve a disabled vehicle that was stuck in Aitkin. She also mentioned that she was caught in traffic that day – even though it was a Saturday around 1:00 p.m.

6. The employer's witnesses vehemently denied that the grievant called or contacted dispatch any time prior to that to request those days off and maintained that she called on May 11th for the first time and that she said she needed the days off to help her son move and with his vehicle.

7. Mr. Pedersen told her that he was unable to grant her request because the markup (schedule) was already complete and since her shift started at 7:30 that night it would be too difficult to change it. He directed her to the Rail Control Center, RCC, to make the request and transferred her to there. The union stipulated that this was a direct transfer that day; thus there is no question that the call which was recorded came directly after her conversation with Mr. Pedersen on May 11th.

8. The employer introduced the voice mail recording of the grievant during the conversation with the RCC and she clearly states that she wanted to take the day as FMLA. She called again on the 12th and again asked for the day off as FMLA.

9. The employer acknowledged that the grievant has an approved intermittent FMLA certification for occasional migraine headaches but that the grievant's comments to the dispatcher seemed highly suspicious. He reported the grievant's absence to Mr. McNamara the following Monday and the grievant filled out and signed FMLA certification forms on Tuesday May 14, 2013. The employer asserted that the grievant has filed many of these in the past and is quite familiar with how to do it and with what they mean. The employer scoffed at the notion that the grievant was "confused" by this form or by the dates. The employer noted that the last time prior to May 14th that she filled out an FMLA request was in November 2012. Further, the grievant checked the box specifically for FMLA just as she had done in the past and certified to the employer that the leave was for FMLA purposes.

10. The employer asserted that this was not true and that the real reason for the absence that weekend was to assist her son and that when the request for the days off was refused, she simply fraudulently claimed FMLA.

11. Further, the employer has a No-Fault absence policy whereby a certain number of "occurrences" if accumulated to a certain level can lead to discipline or even discharge. FMLA related absences are not counted toward those occurrences. Thus an employee has an incentive to use FMLA wherever possible in order to reduce the number of occurrences pursuant to the attendance policy. The employer intimated that this too was a possible motivation for the fraudulent and false use of FMLA.

12. The employer further asserted that when confronted with the evidence that she had in fact called the dispatcher and the RCC and that she did in fact claim FMLA the grievant lied about her actions throughout the investigative and grievance process – changing her story to cover her tracks.

13. The employer asserted that at the first interview regarding this on June 11, 2013, the grievant claimed that she had moved her son that weekend – but later changed that story claiming instead (even up to the hearing), that she was not moving her son that day but rather was assisting him with a stalled car. She further claimed she did not recall the events of that weekend and acknowledged that she would not have used FMLA to move her son. When she was confronted with the clear evidence that she had filled out FMLA forms she quickly changed her story claiming that she had a migraine that weekend. No mention of the details of the trip up north was made at that time.

14. The grievant later conveniently amended her story to include going to northern Minnesota that weekend but claimed that she was unable to drive after taking her medications. She said that she laid in the back seat of her vehicle while her ex-husband drove. These details could have been added during the first meeting but were not. The employer questioned her veracity when she was able to recall very specific details of that weekend yet never told them about having a migraine or being sick until the union business agent pulled her into the hallway during the Loudermill hearing.

15. The grievant met with her managers on June 11th yet never told them anything about riding up north in the back seat of a vehicle with a migraine. In fact she repeatedly denied taking the days as FMLA. When confronted with clear evidence that she had, she claimed that the paperwork was “confusing” and that she has filled out so many forms she lost track of them all, even though it had been 6 months since she had filled out any paperwork for FMLA. See Employer Exhibit 15.

16. The employer relied on the testimony of the managers who were in attendance at the June 11th meeting. The employer further asserted that the testimony of the person who took notes at that meeting was unnecessary because her report is in evidence and Mr. Perron was there and testified directly about his recollection of events that day. His testimony was, according to the employer, consistent with the reports introduced as Employer Exhibits 8 and 9.

17. When the parties met again at the Loudermill hearing, the grievant and her union steward were shown the reports from the June 11th meeting. When asked if they had any issues or whether they believed there were any discrepancies, the union steward said that there were not. It was only at that point that the union business agent stopped the process and took the grievant out in the hall for 20 minutes and her story changed again. For the first time, the employer heard the incredible story that the grievant had asked to have her schedule changed but was denied earlier in the week. She then claimed that even though she had been denied the days off she woke up with a headache that burgeoned into a migraine and that by noon or so she had to take the prescription medications.

18. Moreover, the employer noted that neither the steward nor the business agent testified at the hearing. There was no evidence to refute the claims that the steward met with Mr. Perron and Mr. McNamara after the step 1 grievance meeting and that he acknowledged that what the grievant had just said was wrong. The employer asked that a negative inference be drawn from the lack of testimony from these two individuals and asserted that they would not have supported the grievant's position.

19. The employer argued that it strains credibility that the grievant would not have recalled the trauma of having to lie in the back seat of a car for hours driving to Aitkin Minnesota with a migraine headache. The timing of all these new claims was simply too suspect and demonstrated a lack of honesty throughout this entire process.

20. Even after the termination on June 24, 2013, Joint Exhibit 1, the grievant's story kept changing during the grievance steps. At the June 28, 2013 meeting the grievant maintained that she had contacted Mr. Pedersen earlier in the week to ask for a change in schedule but that he had told her it could not be done so she committed to working. The investigator asked repeatedly if she was certain that she contacted or spoke to Mr. Pedersen on a different day than May 11th to ask for the weekend off. She and her steward consistently both answered in the affirmative. However after the meeting the union steward approached the managers and investigators and told them the story was not true and that the grievant had in fact made the call on May 11th. See Joint Exhibit 6.

21. The employer also noted the curious statement on the grievance itself. While the grievance seeks reinstatement and a make whole remedy it clearly also says, “will consider an LCA,” Last Chance Agreement. This statement is nothing short of a tacit admission of guilt.

22. The employer argued that her story is simply not believable not only because it flies directly in the face of the testimony of the dispatcher but also because it keeps changing all the time. Major details that should have been disclosed at the very first meeting were conveniently ignored or hidden until later on. The employer asserted that these facts show a deliberate attempt to mislead the investigators or hide the obvious facts that the grievant used FMLA and filled out forms for FMLA within days of the weekend in question.

23. The employer asserted that their witnesses were both credible and consistent in their testimony. There was no evidence as to when or even if the grievant had “nonchalantly” met with Mr. Pedersen earlier in the week as she claimed. He denied that and clearly would have recalled that if it had occurred. There is further no reason of him to lie about any of this and the sole way the union prevails is if Mr. Pedersen is lying or completely wrong about his testimony.

24. Finally, the employer pointed to the testimony of the ex-husband who at first seemed to indicate that she had said her head was “pounding” but immediately backed away from that statement and said that he really did not hear much of the conversation on May 11th but that what he *did* hear was that she told the person on the phone that she needed to help “tow her kid’s car,” or words to that effect. Since we have the entire conversation to the RCC on a recording, that statement could only have been made to Mr. Pedersen during the first part of the May 11th call – just as he claimed it was.

25. The essence of the employer’s case is that the grievant got caught lying and has been trying to mislead the employer ever since. As the cases cited by the employer show, such falsification has consistently been treated as dischargeable.

The employer seeks an award denying the grievance in its entirety.

UNION'S POSITION

The union took the position that the grievant's discharge was not just or merited. In support of this position the union made the following contentions:

1. The grievant is a 6-year employee with a clean disciplinary record. She has been both loyal and diligent and there is no reason to believe that she would lie or be dishonest about anything pertaining to her employment.

2. The union noted repeatedly that the grievant was asked about the events of May 11 and 12 nearly a month later without being told what the employer had nor was she given any of the documentation. The union asserted that it is unreasonable to expect that anyone would or could be expected to recall these details without being prompted about what they were. The union asked that everyone concerned think about what they did a month ago without being told or without looking at a calendar or any documentation of their activities and argued that virtually no one would be able to do that. Yet that is precisely what the employer did to the grievant in this instance.

3. The union asserted that the grievant in fact suffered from a migraine headache on May 11th and 12th and that it was severe enough that she had to take prescription medications for it. These medications render her both medically and legally unable to operate a train for the employer. It would have been extremely dangerous, illegal and irresponsible for her to have gone to work those days due to her medical condition. The union further noted that she has a certification for intermittent FMLA leave due to this very condition. There is further no way to predict when a migraine will strike. She simply woke up with an oncoming migraine that day and needed to take the day off.

4. She rode with her ex-husband on May 11th to help her son with a stalled vehicle. She did not drive, as her ex-husband confirmed, but rather laid down in the back seat and slept or remained with her eyes closed to alleviate the effects of the migraine. She was unable to get a good night's sleep on May 11th and awoke with the ongoing effects of the migraine.

5. She was thus unable to operate a rail vehicle that day either. The union asserted that the case is as simple as that – the grievant was stricken with a migraine, took medications for it, was unable to work and called in as she was supposed to and reported that she needed FMLA.

6. The union stipulated at the hearing that the phone call she made on May 11th was indeed transferred to the RCC after she was told by Mr. Pedersen that he was unable to grant her request. The union maintained that the grievant had spoken to him a few days prior to May 11th however and requested to change her days off from the 15 and 16th to May 11 and 12th. When that request was denied, the grievant consigned herself to working that weekend. It was only in the morning of the 11th that she got a migraine and needed the day off.

7. The union asserted most strenuously that the burden of proof is always with the employer and that given the nature of the charges here, the employer should be held to a far higher standard of proof than mere preponderance of the evidence. The burden should be at least clear and convincing and should as many arbitrator hold, be the criminal standard of beyond reasonable doubt.

8. Using that standard, the union argued that there is ample doubt and several reasonable and plausible scenarios that exonerate the grievant and demonstrate that the employer has not met its burden here.

9. The union pointed to the testimony of Mr. Pedersen whom they claim acknowledged that it was “possible” that the grievant spoke with him earlier in the week about getting the weekend off to move her son. That, the union claims, is reasonable doubt. The grievant testified that she in fact did speak with him and he acknowledged this was possible.

10. The union claimed that one very plausible solution is that he simply conflated the two conversations and mixed up the earlier conversation with the one he had with the grievant on May 11th when he was asked about it a month later. He gets many calls per day, keeps no regular log of these calls, nor is there any record of the content of those calls and may well be confused about the exact time of these contacts.

11. The union noted too that Mr. Perron acknowledged a similar possibility and admitted on cross examination that the grievant could well have spoken with Mr. Pedersen a day or so before the 11th to ask about changing her days off. The union noted that if that happened the employer's case is entirely undermined. The union pointed to Joint Exhibit 6, which it asserted shows that the grievant told the employer that she spoke with Mr. Pedersen prior to the 11th.

12. The union further posited the notion that the grievant had told Mr. Pedersen that she was going to help her son move but that when she realized she would not be able to get the weekend off she planned on working. When the son contacted her regarding the car she needed to go to Aitkin to tow the vehicle and had her ex-husband drive because of the migraine. She went with him due to concerns about insurance on the vehicle and whether it would be covered since he was driving.

13. The union maintained too that her story has never changed. She was essentially ambushed on June 11th and simply did not associate the weekend of May 11 and 12 with a migraine because it had been a month since the incident. She recalled both needing to help her son and that she had contacted Mr. Pedersen at the June 11th meeting and the investigative report even shows that. She suffers from them frequently and simply did not associate that weekend with having a migraine.

14. The union assailed the veracity and probative value of the reports of the June 11th meeting. First, that the investigator was not called at the hearing. She took handwritten notes that were obviously later transcribed into the typed report introduced as Employer Exhibit 8. No one knows who typed it or whether it accurately reflects the handwritten notes since they were not introduced.

15. Further, that report was later typed again as Employer Exhibit 9 and was the basis of the discharge here. The union asserted most strenuously that these reports are hearsay at best and lack probative value since the person who wrote them was not at the hearing. The union asserted that a negative inference should be drawn from this and asked that the arbitrator presume that she might not have supported the employer's case had she been there.

16. The union noted too that even with these glaring gaps in the employer's case, there was no mention of the earlier conversation when the grievant noted that she "approached" Mr. Pedersen to ask about getting the weekend off. An "approach" is very different from a "call" and connotes a face-to-face conversation.

17. The union noted that the entire case hinges on what it termed the "immediacy" issue and whether in fact there was an earlier contact that could have confused Mr. Pedersen. If one believes that there could have been such a conversation, as the union asserted, then the inescapable conclusion is that on the 11th the request for time off was solely due to the need for FMLA because of the migraine.

18. The union noted too that at the Loudermill hearing, Mr. Lawson was concerned about the lack of veracity of these reports and simply asked for a recess to get pertinent facts about the case. He then articulated what the grievant had already told the employer about what had happened. Thus there was no attempt to fabricate a story as the employer suggests. The union representative was simply doing what a union representative is supposed to do – articulate the grievant's position perhaps in a more artful way than the grievant can since they are being charged with dismissal and may be confused and somewhat nervous about the whole process. There was no question, according to the union, that the employer sought to confuse the grievant by not showing her relevant documents until after asking her about an event over a month before and accusing her of things she did not do even though she clearly told them the truth from the very beginning.

19. The union also pointed to the testimony from the grievant's ex-husband and noted that it is a bit uncommon for an ex-spouse to come to the aid of his former wife yet he was willing to do so in order to make sure the truth came out here. He acknowledged that the grievant was ill that weekend and in fact rode to Aitkin while sleeping in the back of the vehicle due to her migraine. He further verified that she remained ill over the weekend and was in no shape to operate a rail vehicle.

20. The essence of the union's case is that the grievant told Mr. Pedersen about having to move her son before May 11th and that she in fact was suffering from a migraine on both the 11th and 12th and legitimately filed for and received FMLA for these days. She has been completely truthful to the best of her recollection during this entire case. She wants her job back and wants nothing more than to retire with this employer.

The Union seeks an award overturning the discipline, expunging the grievant's record and reinstating all lost back pay and accrued benefits as the result of the discipline in this matter.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

Rarely has there been a case with more disputed facts, countervailing claims and contrary inferences to be drawn from a record replete with differing versions of the events in question. The factual background of this award will begin only with those few facts that were either undisputed or for which there could be no doubt. The remainder will focus on the many disputed facts and claims and the conclusions to be drawn from the record as a whole. Needless to say, this was a difficult decision.

The Met Council operates a transit system in and around the Twin Cities area. They operate both buses and LRT trains and it is clear from the evidence that safety of the traveling public as well as the public in general is the company's number one priority. It is of course a common carrier and by common law held to a very high standard of care in the operation of its vehicles.

The grievant is a rail operator with a 6-year clean disciplinary record and an otherwise good work record. She was injured at work in October 2012 and first reported the injury on November 29, 2012. This injury was admitted by the employer and benefits were paid pursuant to Minn. Stat. Ch. 176. She was out of work from late November to late December 2012 and returned to work on a light duty basis. She was not operating the rail vehicles at that time but was rather cleaning cars and doing other light duty work. The details of this are not material to this dispute but her work schedule changed because of it.

Her schedule while on light duty was to have Saturdays and Sundays off. This continued for several months until she was to return on a more regular duty basis in May 2013. She was scheduled to be off on Saturday May 11 and Sunday May 12, 2013. There was no question that the grievant asked to have her schedule changed to have May 15 and 16, 2013 off instead of the 11 and 12th. The record showed that this was likely due to creating a block of time around the grievant's birthday and would have resulted in 6 days off.¹ This request was granted and resulted in the schedule changing from having the 11th and 12th off to her working on those dates and having the 15th and 16th off instead.

This brings the case to the week of May 6-12, 2013. As discussed below, one of the main issues in this case is whether the grievant contacted her dispatcher Mr. Pedersen in that week to ask if the schedule could be changed back to what it had been before she asked for the 15th and 16th off. There was no agreement on that question whatsoever.

What was undisputed was that the grievant called dispatcher Ed Pedersen around 1:00 p.m. on Saturday May 11, 2013 and spoke to him about getting the day off. The content of this conversation was hotly contested, discussed more below, but there was no question that the call was made and that the call was transferred to the RCC.

The parties stipulated to the fact that the call on the 11th was transferred from the dispatcher to the RCC. That call was relatively short and the grievant clearly asks for FMLA. She also called the RCC the following day and again asked for FMLA.

The evidence showed too that the grievant was scheduled to work at 7:30 on May 11, 2013. She called in at approximately 1:05 p.m. that day when she requested the day off. She claimed that she was stuck in traffic as well although it was not clear where that was or what traffic there was on a Saturday afternoon.

¹ The collective bargaining agreement grants a day off for employees' birthdays and the grievant's birthday fell on May 19th, a Sunday. The record reveals and there was little argument that she took these days off to build a solid block of days off as a result.

The record also revealed that while absences are counted as “occurrences” under the employer’s No-Fault attendance policy the grievant was not near any of the thresholds for disciplinary action under the policy. See Employer Exhibit 15. It was clear that the grievant was off work many days due to work related injuries or FMLA leave, she had one chargeable occurrence in the year prior to May 11, 2013. This was on April 5-7, 2013 for being sick.

The evidence clearly showed that the grievant in fact did not work on either day in question and that she went with her ex-husband to Aitkin, Minnesota that weekend. She claimed to have had a migraine headache that weekend and even though she rode along she claimed to have spent the ride in the back seat with her eyes closed.

The grievant met with Mr. McNamara on May 14, 2013 and filled out FMLA paperwork that day for both the weekend days. This of course was only two days before. See Employer Exhibit 16. She filled out the entire form and signed it, checking off the box requesting FMLA. The evidence showed that she is quite familiar with FMLA forms and the process for requesting it. The record showed that she has filled out these forms some 50 times over the past few years prior to her termination. Her claim that she was confused by them rang somewhat hollow on this record.

Mr. Pedersen met with Mr. McNamara on Monday May 13, 2013 and informed him that the grievant had not worked over the weekend and that it seemed strange that she first requested time off to help her son but that she had taken the days as FMLA. As noted above, Mr. McNamara met with the grievant the very next day and signed off on the FMLA request. He apparently did not inquire as to the information from Mr. Pedersen the day prior regarding the reason for the request for time off.

The employer held an investigative meeting on June 11, 2013. It was not clear why there was a delay of nearly a month between the submission of the FMLA forms and June 11th. The union asserted strenuously that this delay naturally made it difficult to recall specific details yet the grievant was able to recall vividly that she helped her son but did not mention the details of having a migraine or riding in the car and maintained during the meeting that she did not have a migraine that weekend.

The record further revealed that there were no other requests for FMLA during that period. The grievant, her union representative, Mr. Perron and Mr. McNamara attended along with the interviewer, Ms. Katie Shea. Ms. Shea took handwritten notes during this meeting but those were not introduced. Those notes were typed into the document introduced as Employer Exhibit 8 although it was not known who typed them. This document and that meeting was the source of considerable dispute during the hearing and will be discussed more below.

Employer Exhibit 9 was introduced and is the final report upon which the discharge herein was based. That document was also prepared by Ms. Shea and is dated June 13, 2013, two days after the initial meeting. Again that document was the subject of much testimony and acrimony during the scope of the hearing and as will be discussed below contains some differences from Employer Exhibit 8. Again, it was not clear who typed the document or what other information might have been used as the basis for the information contained in them since Ms. Shea was not called to testify at the hearing.

The employer held a Loudermill hearing on June 20, 2013. The grievant, Mr. Rogers, the steward, Mr. Lawson, the ATU business representative, Mr. Perron and a Mr. McGuire attended this meeting. Mr. Perron prepared the report of that meeting dated June 20, 2013. The evidence showed clearly that the union by this time had the documents referred to as Exhibits 8 and 9, the policies in question as well as the FMLA forms the grievant filled out on May 14, 2013 with Mr. McNamara.

The unrefuted testimony showed that Mr. Perron asked the grievant and her steward if there were any discrepancies with the above referenced documents, including Employer Exhibits 8 and 9. Initially the steward indicated that there were no discrepancies. The grievant did not respond to this nor did she say anything different from that.

Mr. Lawson however interjected at that point that he did not want the grievant to answer the questions and called for a recess of the meeting. Before leaving there was a brief conversation regarding the May 14th FMLA forms and the union steward and the grievant acknowledged that the date was accurate and that there was no contest regarding that form.

The union representatives and the grievant then left the meeting and caucused for approximately 20 minutes. When they returned the union outlined the grievant's position with regard to the use of FMLA and her version of what happened that weekend. Some of the allegations from the union regarding the pertinent events were stated at this meeting for the first time and were not brought up at the June 11, 2013 initial investigatory meeting.

The notice of discharge was served June 24, 2013 alleging violations of Policy 4-6, Rule CC111 and the Light Rail Operator's Policy, Joint Exhibits 2, 3 and 4. The basis of the discharge was that the grievant falsified the request for FMLA and that she lied to the employer when she called the RCC and claimed FMLA for May 11 and 12, 2013.

The parties held a step 1 grievance meeting on June 28, 2013. This meeting was attended by the grievant, Mr. Rogers, her union steward, Mr. Patrick Kane, who facilitated the meeting and drafted Joint Exhibit 6, Mr. Perron, a Ms. Padden from Labor Relations and a Ms. Boucher from light rail operations. The union was given an opportunity to state its position and reiterated that the grievant was indeed suffering from a migraine that day. One reference made by the union that did not appear in the earlier meetings was that the grievant had contacted the dispatcher a day or so prior to May 11th to request the weekend off. This was something new.

While Mr. Kane did not testify at the hearing, Mr. Perron confirmed and the unrefuted testimony shows that the grievant and the union were asked repeatedly if she was sure the contact to request the weekend off came before May 11th to which she responded that it was. The union steward was there for all of this, agreed with the statements regarding when the first contact was made but that after the meeting concluded and after the grievant left the steward approached Mr. Kane to further discuss this crucial point.

The record reflects that he then told with Mr. Perron and Mr. Kane that the grievant was incorrect about those dates and that he had spoken to Mr. Pedersen about this. The clear import of this is that the grievant was not accurate about when she first contacted the dispatcher to get the weekend of May 11 and 12 off and that in fact it was the same day, i.e. May 11, 2013. See Joint Exhibit 6.

The parties then held a step 2 grievance meeting on July 15, 2013. The union was again given an opportunity to state its position. At this point the union added that there was no proof that the grievant did not have a migraine in the days in question and that the majority of the FMLA forms she submitted were for workers compensation. There was no further evidence of that latter point on this record and no evidence that any of the forms introduced as Employer Exhibit 16 were wrong or that she submitted them as FMLA but were really for workers compensation.

Finally, the grievance form, Joint Exhibit 5, alleges a violation of Article 5 (1) and (3) and that the charge was not just and merited. It seeks as a remedy as follows: "Please to remove discipline from file and make whole in all respects. Will consider a L.C.A." This also factored into the decision.

As noted above, these were for the most part the undisputed or unrefuted facts. There was however a plethora of other disputed evidence in the case. While all cases depend on the evidence; and this one certainly does, this matter was decided as much by the evidence that was not on the record as the evidence that was. There were several witnesses that could have been called, and frankly probably should have been, and their conspicuous absence made the case all the more difficult to decide. Suffice it to say that it is against this complex factual backdrop that the analysis of the case proceeds.

PEDERSEN'S TESTIMONY

Both parties agreed that his testimony was crucial to the outcome of this matter. He testified that he recalled being told during the May 11th conversation with the grievant that she needed the weekend off to assist her son. It was not completely clear if she said she needed it to move or to assist her some with a stalled car but his testimony on direct was that he specifically recalled her asking for the day off for that purpose.

There was little question that he was unable to change the schedule at the time she called since she was scheduled to work at 7:30 that night and the markup had already been completed and could not be changed easily. He informed her that she would need to talk to the RCC to get the schedule changed and transferred her directly there. There was no question that she spoke to the RCC and asked for the time off as FMLA when she did. The audio recordings were not disputed for either day.

On cross examination Mr. Pedersen was asked if there was some possibility that she could have spoken to him earlier that week to have the days off. The union asserted that there is at least a reasonable doubt that this occurred. What he actually said though was that he did not recall this but that there was always a possibility that she asked him “nonchalantly” about it earlier in the week but that it was unlikely. Countering this was the testimony that he spoke to Mr. McNamara on May 13th and told him that the grievant had asked for time off to help her son. He further indicated that he did not recall having any conversation with the grievant between May 8th and May 11th regarding her son.

While it might be remotely possible for there to have been a conversation in that week and that he conflated the two conversations, it is unlikely given that he mentioned the conversation to Mr. McNamara the following Monday. Not being able to recall that conversation is not the same as an admission that it did occur. Considerable thought went into his testimony and the record was reviewed several times to assure there were no inconsistencies. Obviously if he had been asked this question for the first time a month later, the inferences to be drawn might well have been different. Further, he mentioned the oddity of having the conversation about the son and then noting that she took the days as FMLA the Monday following the days in question. Indeed, that was the sole reason for the commencement of the investigation.² At the end of the day, Mr. Pedersen’s testimony in this regard was accepted as far more likely and plausible.

² As noted above, it was never explained why the employer waited a full month to call the grievant in nor was it clear why Mr. McNamara did not ask her about this on the very next day when they met to fill out the FMLA forms. It might well have obviated this entire case if that had occurred but the arbitrator is faced with the record as it is and cannot engage in too much speculation about why these things occurred the way they did.

PERRON'S TESTIMONY

He was in attendance at both the initial meeting with the grievant on June 11 as well as the Loudermill hearing on June 20, 2013 and could give direct testimony regarding what was said at those meetings. One of the employer's main assertions is that the grievant changed her story several times by adding things as the facts became clearer that she had falsified the FMLA forms in question. He was thus able to give competent and persuasive testimony regarding the events of those two meetings.

As discussed at the hearing, one possible gap in the employer's case was the lack of testimony from Ms. Katie Shea. As the drafter of both Employer Exhibits 8 and 9, her testimony would have been both helpful and possibly persuasive one way or the other.

Frankly, without Mr. Perron's testimony regarding these meetings the employer would have simply been unable to sustain its burden of proof, even by the preponderance of the evidence standard and this grievance would have been sustained. Since he was able to do so, the lack of Ms. Shea's testimony did not prove fatal to the employer's case.

He was able to give persuasive testimony that the grievant never raised the assertion at the initial meeting on June 11th that she had been ill with a migraine or that she rode in the back seat of a vehicle after taking her medications. He verified that the grievant, who was represented by her steward at that meeting, denied using FMLA for that weekend even after being informed that the employer had the forms she filled out. He also provided persuasive testimony that the grievant admitted helping to move her son on those days – which was as discussed below – a somewhat different story from what she said later in the investigative and grievance process and at the hearing, i.e. that she was only going to help her son with a stalled/disabled car.³ She did not provide the details she did later regarding riding in the back seat of a vehicle or even that she in fact had a migraine headache that weekend.

³ Much of the employer's case was predicated on the assertion that the grievant's story changed so radically over the course of time. Thus, the testimony regarding this was far more important to this record than the documents, which were drafted by someone who was not called to testify.

He was also at the Loudermill hearing on June 20, 2013 and drafted the report of this meeting. It was clear that the information regarding the basis for the employee's charges against the grievant were provided to her and to her union steward prior to that meeting. It was at this meeting that the steward indicated that there were no discrepancies with the reports but the business agent intervened and asked for a break. After they returned, the union and grievant added significant details about the events of the days in question. Many of these had not been stated before and some were inconsistent with what had been stated before during the investigation.

The union asserted that the story has not changed in any significant way but the evidence showed otherwise. At the June 11th meeting the grievant did not disclose or allege that she had ridden in the back seat of a vehicle or even that she had a migraine. Those details were apparently added on June 20th at the Loudermill hearing.

One of the gaps in the union's case was the lack of any testimony from either Mr. Rogers, the steward, or Mr. Lawson, the business representative. Without their testimony in rebuttal to the employer's allegations the record was lacking to support the claim that the story was in fact the same the whole way through this. While Exhibits 8 and 9 were given very little weight, the testimony of Mr. Perron was.

Further, significantly, the grievant testified that she was confused during much of this but never completely refuted many of the employer's claims or the testimony of Mr. Perron in this regard. It was also apparent that the story changed slightly from originally trying to help the son move to helping the son with a stalled vehicle. The arbitrator was cognizant of the allegation that originally when the grievant wanted the days off, she asked for those in order to help her son move but that when she was told she could not get those days off again after having just moved them, she resigned herself to working. The issue here though is that her story changed during the investigation in significant ways.

On balance, it was clear that significant details were added to the grievant's version of this as time went by. While that alone is not the basis of the employer's claim, it provided substantial evidence that the original version was not as it was later alleged and that some parts were frankly fabricated as time went by.

Mr. Perron was also at the first step grievance meeting and verified that the grievant was asked many times if she was sure she contacted the dispatcher a few days prior to the 11th to ask for the weekend off. She maintained that she had. He further verified that after the meeting the steward approached him and Mr. Kane to essentially acknowledge that the grievant was wrong and that it was the same day, not a few days before. There was no rebuttal to that evidence.

Finally, he attended the second step meeting as well. He asserted that the story changed again but by this time the story was consistent enough that the version of the events of May 11 and 12, 2013 were recounted as they had been in the Loudermill and the first step meeting.

His testimony was challenged on cross-examination and he acknowledged that some portion of the notes as stated in Exhibits 8 and 9 were not accurate. He further acknowledged that it was possible that the grievant had contacted Mr. Pedersen to request the weekend off and that this could well have been before May 11th and could also have been a face-to-face contact as opposed to a phone call. The union pushed him quite hard on the question of whether the notes in Employer Exhibit 9 showed that the grievant "approached" the dispatcher before May 11th.

Those notes showed that the sentences that were the subject of such controversy at the hearing read as follows: "however she [the grievant] approached a rail dispatcher on May 11 and asked for the weekend of May 11 and 12 off to help her son move." The dispatcher said, "No," because the markup was already done and changing it would be too complicated. On the 11th [the grievant] called into the Rail Control Center (RCC) reporting that she would not be working her shift." Thus the notes do not truly reflect that there was a call before May 11 but rather one that occurred on May 11.

The union asserted adamantly that the notes and the record reflected a contact prior to the 11th for the purpose of taking the weekend off. There was simply inadequate evidence of that other than the grievant's statement to that effect. There is no evidence of a call and the dispatcher does not recall it, as discussed above. This is a critical point since the main basis of the union's claim is that the grievant did not in fact mention needing to help her son move or to help with his car in the call on the 11th and that the dispatcher may have been confused about this. Further, while the notes reflected at Employer Exhibits 8 and 9 could frankly have been more artfully drafted and better supported by the person who actually wrote them, there was adequate evidence to demonstrate what went on in those meetings and how the grievant's story changed over time.

THE GRIEVANT'S TESTIMONY

The grievant testified that she has intermittent migraine headaches and has been approved for FMLA. She also indicated that she was confused by the number and nature of these forms but the evidence showed that she had no trouble filling out those forms and know what they mean. She was out of work for a period of time following her work related injury and she was on a light duty assignment until May 2013. During that time of light duty her schedule included Saturdays and Sundays off.

There was no dispute that on or about May 8, 2013 she requested a change in that schedule to get May 15 and 16 off work. That was granted and she then was scheduled to work at 7:30 p.m. for 6 hours. It is at this point the testimony became quite disputed.

She claimed that after this schedule change she found out her son was moving and requested to change back to her former schedule in order to help him. She claimed that this conversation occurred sometime in the week just prior to May 11th but was unclear as to exactly what date that occurred. The union asserted that this would not be unusual given the amount of time that passed and that argument held some merit. Without notes or some record of the conversation it would be difficult for anyone to recall the exact date of an allegedly casual conversation months away from the events in question.

The grievant asserted that she was in fact suffering from a migraine headache that was severe enough that she needed to take prescription medications for it. These prevent her from operating a rail train. Obviously, if that was the case there is no question that FMLA was entirely appropriate and that her usage of it even if she did go to Aitkin to help her son. The difficulty here is that one must either believe the grievant or one must believe Mr. Pedersen regarding the phone call on May 11th.⁴

Turning back to the events in question, she further claimed that she called on May 11th and spoke to the dispatcher about taking the day off. She claimed that it was due to a migraine. As noted above however, she did not mention that at all at the June 11 meeting and flatly denied then that he took FMLA for that weekend. As the union asserted, she may simply not have recalled the events after a full month and may well have felt a bit ambushed by it all. She recalled the events of that weekend though and getting her son's car immediately upon being asked about that weekend but did not even allege that she was ill with a migraine. Neither did she recount laying in the back seat of a car with a migraine. At no point in the initial meeting did she say that she had a migraine. This frankly appeared to be more than a simple slip of the mind since she recalled getting her son's car that weekend.

However, the evidence showed that she was informed that she had filled out paperwork for FMLA at the June 11th meeting yet still denied it and maintained that she was up north helping her son. She never asserted that she had a migraine despite the fact that she had no FMLA leave used after May 12th and had no previous usage of FMLA since November 2012.

Further, the events at the Loudermill hearing cast further doubt on the veracity of her story. She already had the information on which the employer was relying for this charge. This was a Loudermill hearing and the evidence showed that she was well aware of the gravamen of the charges against her and of the potential for serious discipline.

⁴ Neither the union nor the grievant ever indicated that the grievant told the dispatcher that she both had a migraine and that she need to help her son. This case was always couched in terms of her saying that she had a migraine both to Mr. Pedersen and the RCC when the call was transferred. It was also couched in terms of there being a prior contact with Mr. Pedersen to re-do the schedule.

Significantly, the initial reaction from the union was that there were no serious discrepancies in the versions of the events. It was only after the union representative intervened and pulled the steward and the grievant in the hallway for a 20-minute caucus that the story unfolded as it exists today. This is not to say that the union coached the grievant or that it did anything underhanded. The inference to be drawn here is that the grievant's story kept changing and did so again between the time of the initial meeting on June 11 and the Loudermill 9 days later.

She testified that she did not intentionally falsify anything and simply did not recall whether she had taken FMLA when first confronted about it on June 11th. Without more this would have been a completely plausible and even possible scenario. There was more to the story though and on his record Mr. Pedersen's version of events was viewed as being a more plausible scenario.

LEACH TESTIMONY

The grievant's ex-husband testified on her behalf and indicated that she slept in the back of the vehicle while he drove to assist the couple's son. His testimony was not as helpful to her cause as the union might have hoped. He indicated that he overheard the phone call of May 11th and at first indicated that he thought he heard her say that her head was pounding. Shortly thereafter though he said that he really had not heard much, was not paying much attention but then finally indicated that he did hear her say that she had to go "get her kid's car."

As discussed below there is nothing more difficult than trying to assess which version of diametrically opposed stories is accurate or closer to the truth in the face of such divergent testimony. Here though the witness called by the union acknowledged what the employer has been asserting all along – that the grievant said on May 11th that she needed to help her son. Since there is no such statement on the tapes to the RCC, this must therefore have been during the call made to Mr. Pedersen.

ANALYSIS OF THE EVIDENCE AND BURDEN OF PROOF

The union asserted that the burden of proof given the nature of the charges should be the same as the criminal standard of beyond reasonable doubt. Some arbitrators may hold to this in a case involving more direct criminal offense – such as theft, assault or vandalism. Here while the allegation is falsification of company documents there are no criminal charges pending. The upshot of the employer's case is that the grievant, having been told she could not change the schedule to help her son get his stalled car, tried to use FMLA leave for this and that she falsely claimed a migraine headache.

On this record, the standard applied is whether the employer has proven its case by clear and convincing evidence. If the only evidence in the case had been the grievant and Mr. Pedersen, there would have been no question that the grievance would have been sustained. Here though several things conspired to swing the balance of proof in the employer's favor.

First, there was the fact that Mr. Pedersen had no incentive to fabricate his story and even though he acknowledged that it was possible to have had a conversation with the grievant about changing her schedule before May 11th he was firm in his stance that he did not recall any such scenario. Further there was some merit to the claim that he would have recalled it since that conversation was to have occurred only a day or so prior to the 11th. Finally, there was the clear fact that he spoke to Mr. McNamara the following Monday and brought it up then.

There was also the clear fact that neither the steward nor the business representative were called to refute the events at the Loudermill or the grievance step meetings. Those events raised considerable suspicion about the veracity of the grievant's story. They also raised concerns about the conversation between the steward and Mr. Kane and Perron after that meeting.

There was also the change of story and the comments made by the grievant at the initial meeting on June 11th. It was clear that she denied even using FMLA and claimed she had no idea what went on that weekend but was immediately able to recall that she helped her son but never claimed illness that weekend.

The fact that she recalled some of the events vividly yet not the most important one was curious at best. While the union asserted that these stories did not change, the evidence showed that they did. While this is not the sole piece of evidence, this undercut the credibility of the grievant's version. Finally, there was the testimony of Mr. Leach who eventually indicated that he did hear the grievant say during the conversation on the 11th that she needed to go to "get her kid's car."

The employer cited a number of cases that have upheld discharges. These were reviewed in some detail and were certainly valid for the proposition that once any sort of falsification of documents has been found; the employer has consistently enforced this and discharged the employee. They were of course very fact specific and did not add much weight to the employer's case here. Some even had very direct evidence of fraud, which was not present here. They were however determined to be significant and persuasive of the proposition that once evidence of such falsification has been found, the result is clear.

As noted herein, the case was rife with conflicting versions of the same event. This was hardly an easy decision and the result here is not a reflection of the grievant's character. Her motivation was clearly to find time to help her son but the methodology was problematic. The basis of the decision is simply based on the greater weight of the evidence put forth by the employer and the clear precedent in the cases cited by the employer in support of its decision here. Accordingly, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: February 19, 2014

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Jeffrey W. Jacobs, arbitrator